

Minimum Contract Level
Frequently Asked Questions

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1. Can you identify which provision is covered by the minimum contract level policy?

The following funding streams allocated by the Skills Funding Agency (the Agency) are to be taken into account when determining whether an organisation is above the minimum contract level (MCL):

- *Train to Gain;*
- *16-18 Apprenticeships;*
- *19+ Apprenticeships;*
- *Adult Learner Responsive (ALR);*
- *Adult Safeguarded Learning including Family Learning Impact Fund, Formal First Steps, Learner Support; and*
- *European Social Fund (ESF) (see question 2 below).*

Allocations made by the Skills Funding Agency for all these areas in 2010/11 are available on the Agency website:

<http://skillsfundingagency.bis.gov.uk/providers/programmes/>

2. Will ESF allocations be taken into account of MCL? (UPDATE)

Yes. All 19+ ESF allocations in place at the start of the 2010/11 academic year will be taken into account when determining whether an organisation is above or below the MCL. An academic year figure for 2010/11 has been published as part of the Agency's allocations and this will be used.

The Young People's Learning Agency (YPLA) has indicated that it will not place a minimum contract level on ESF contracts for pre-19 work whereas the Agency will treat post-19 ESF contracts, with the exception of Community Grants, in the same way as other mainstream funds. Further details of this are set out in the answer to question 35 below.

3. Why does it include Apprenticeships 16-18 when this is YPLA provision? (UPDATE)

The Skills Funding Agency, through the National Apprenticeship Service (NAS), holds responsibility for funding 16-18 Apprenticeships. The Agency contracts and manages this provision on behalf of NAS.

Following discussions between the Agency, the Department for Business, Innovation and Skills and the Department for Education, it has been agreed that 16-18 Apprenticeships provision will be included in the application of the Minimum Contract Level policy. Safeguards are in place to ensure that where there is a risk of specialist provision being lost, or a significant impact on the choice available in particular localities for example, in rural communities, the Agency will consider on a case by case basis whether alternative arrangements should be made.

4. MCL is based on 2010/11 allocation, are we expecting any further changes to the MCL as a result of the comprehensive spending review?

No, the Agency's intention is to base the MCL on the allocation that was given out at the start of 2010/11. In year changes to a provider's overall contract value, either positive or negative, will not effect the application of the MCL threshold.

5. When will we be written to formally to inform us we are affected by the MCL policy? (UPDATE)

The Agency wrote to all providers under the threshold on 14 December 2010 confirming their status as being below the threshold and setting out the required next steps. The Agency has also released guidance at this time that sets out the implementation process and timescales so all providers are aware of the actions they may need to take. If you are in any doubt, please contact your Account Manager.

6. Can you tell us when we will be formally informed what our contract value would have been for 2011/2012 so that we can formally start negotiating? (UPDATE)

The Agency notified all providers of their indicative Employer Responsive and ALR 2011/12 allocation in December 2010, including the potential allocation that training organisations below MCL could have expected. Indicative allocations for Adult Safeguarded Learning and 16-18 Apprenticeships followed on 31 January 2011. The Agency will issue final allocations at the end of March 2011 following inclusion of changes due to the implementation of minimum levels of performance.

7. There is concern that setting up a new holding company for consortium arrangements will take longer than the time allowed by the Skills Funding Agency to have these arrangements in place. Will there be scope for extending the dead line to enable complex arrangements such as setting up a holding company or a consortium to take place? (UPDATE)

The Agency has been trailing MCL for well over a year and formally announced it in Guidance Note 5 (issued July 2010) which was followed by discussions between account teams and colleges/providers. The Agency's process for implementing MCL is predicated on the need to give organisations the time and opportunity they need to find alternative arrangements in order to remain in business meeting the skills needs of learners and employers.

The Agency will be as flexible as possible in the timescales and processes it sets for new delivery arrangements to be formed. As for all other organisations these new organisations will need to be on the Agency's Approved College and Training Organisation Register (ACTOR) in order to be considered for funding.

The Learning and Skills Improvement Service (LSIS) have produced guidance for providers on entering new arrangements:

<http://www.excellencegateway.org.uk/MCLsupport>

ACTOR was reopened following the freeze of applications on 14 January 2011 and will remain open for existing organisations to update their details or new organisations to register until a second freeze date on Friday 14 March. The final freeze for submitting new information related to MCL is Friday 15 April.

8. Is it possible for a provider affected by the MCL to split their provision between two or more prime contractors? (UPDATE)

The Agency will give providers affected by the minimum contract level an indication of the size of the 2011/12 allocation they would normally have received. It is then for the provider to enter into a new arrangement that suits their circumstances. If a provider wishes to work with two prime contractors, the Agency would have to split the smaller provider's allocation across the two prime contractors. In these cases, the Agency would need written agreement of the split and confirmation that both lead providers had agreed to this. It is not the Agency's role to arbitrate in such matters. Any organisation considering this model should seek their own legal advice regarding arrangements and be satisfied that the agreement reached is not disadvantageous to them and question whether holding separate sub-contracting agreements delivers the efficiencies required of the sector.

See also Question 11.

9. What is the Agency's policy on the setting of management fees? (UPDATE)

These are set out in the Funding Requirements for 2010/11 and state that the split of funding between lead and sub-contractor should be proportionate to the costs of the respective parties and that the Agency expects the actual delivery costs to account for at least 85% of the funding. This is the minimum the Agency expects and in many cases the actual delivery costs through the sub-contractor will account for 90-95% of the funding.

It may be that additional services provided to the sub-contractor or delivery split between the lead and sub-contractor mean the level of funding going to the sub-contractor could be less than 85% - in these circumstances the additional services or split of delivery should be clearly documented, understood and agreed by both parties.

Information on the fee being charged is collected and published by the Agency. Through this the Agency will monitor how funding is used to ensure that sufficient funding is used to support high quality educational and vocational training. The Agency is not currently proposing to set any limits on the management fee as that is part of the agreement between the lead and sub-contractor. However, this is an area that we will want to review.

The Agency believes publishing this information will bring much greater transparency to how funding is being used.

Providers entering sub-contract arrangements should be aware of the services being provided by the contract holder and satisfy themselves that the fee to be charged is commensurate with these. Further guidance on entering sub-contract arrangements is available from LSIS via the Excellence Gateway:

<http://www.excellencegateway.org.uk/MCLsupport>

10. What are the plans the Agency has to manage and monitor the quality of sub-contracted, consortium or managing agent provision?

The responsibility for the quality of provision/quality assurance will rest with whomever the Agency holds the contract with, i.e. the primary contractor, and it is for that organisation to determine their delivery model. That organisation will be subject to the performance management arrangements of the Agency. Part of that performance management may include a discussion regarding the performance of their sub-contractors and how they are addressing any issue of underperformance but the direct relationship will continue to be with the lead contractor.

The Agency is currently considering whether all sub-contractors should need to be on ACTOR, or whether this should at least apply to those above a certain threshold.

11. What happens if I have a dispute with the organisation I choose to sub-contract with or go into a managing agent relationship with?

That is entirely a matter for the providers in question. It is not the role of the Agency to intervene in such cases. All providers should make sure they seek legal advice before entering into any new delivery arrangements. This should include consideration of appropriate 'break clauses' in the agreement between lead provider and sub-contractor. See also question 12.

12. If the arrangements I choose do not work out in year one can I opt out and choose to move my provision to another Skills Funding Agency contractor?

Providers need to ensure that they have the ability to opt out of arrangements, such as clear break clauses in the sub-contract agreement. Sub-contractors or consortia members will not be able to automatically transfer their share of provision between providers as this provision is held by the lead provider only and the Agency will only have a contractual relationship with lead providers. It is entirely at the discretion of lead providers what proportion of provision a sub-contractor or consortia lead should receive.

13. Is there a limit on the amount of provision a lead provider can sub-contract?

While the Agency has previously stated that there were limits on the amount of provision that a contractor had to deliver directly, latest legal advice has allowed us to remove this requirement. This means that the Agency will simply seek to procure educational and vocational training services and it will be for organisations to determine their own delivery model.

Historically, the voluntary and community sector have formed consortia organisations to bid for work, and the lifting of a rule to disallow these consortia from bidding as managing agents is welcome news to the sector.

14. My organisation is not affected in year 1; however I may be affected in years 2 and 3 if the MCL threshold increases. Can I opt to go in to new arrangements earlier? (UPDATE)

Yes. The Skills Investment Strategy confirmed that increases to the threshold will only be considered following an impact assessment of its application in 2011/12. However the threshold will be applied to each new academic year's allocation. Providers will be

aware of their own performance and indicative allocations for 2012/13 and so should allow themselves sufficient time to consider their options.

Guidance for providers currently above the threshold but considering entering new arrangements for 2011/12 and the timescales for providers wishing to make arrangements for 2012/13 and beyond are contained within Guidance Note 6: <http://skillsfundingagency.bis.gov.uk/providers/allthelatest/guidancenotes/>

15. We are a provider who is broadly satisfactory on a range of measurements (Inspection, Framework for Excellence (FfE) and Success Rates etc) we are concerned we won't be able to sort an arrangement out because organisations are only looking for good or better providers to offer sub-contracting or other arrangements to, what will happen to us?

If a provider is unable to source alternative delivery arrangements, the most likely course of action is that it will be placed on a run-down contract so that existing learners and activity is funded for as long as necessary before the contract is terminated.

16. Our organisation doesn't deliver an Apprenticeship framework – what happens to us?

The minimum contract level for 2011/12 will be applied on the basis of a provider's total contract value with the Agency as at the beginning of the 2010/11 academic year. If a provider is below the threshold it will need to seek alternative delivery arrangements if it wishes to continue to be part of the supply chain.

17. We are a provider with a combined contract with the Agency worth over £500,000. Our employer responsive element of that is below the MCL threshold. Is the MCL viewed as the combined contract held with the Agency and therefore will we continue to be contracted directly through the Agency to deliver employer responsive provision?

Yes, the MCL will be applied on your total contract value, including any provision you sub-contract. See also question 1.

18. We currently deliver Train to Gain provision through our direct contract with the Agency. We currently don't deliver Apprenticeships but are planning to start delivering them. Will we be allowed to start delivering this new area of work? Will we have to tender to do this through ACTOR or will we be able to start delivering Apprenticeships without having to tender?

Freedoms and flexibilities mean that you can deliver 19+ Apprenticeships now although you should alert your Account Manager as there are necessary amendments to the funding systems required so you can enter the appropriate data. For 16-18 Apprenticeships, a contract variation will be needed and there are additional requirements so you must discuss this with your Account Manager before committing to delivery.

The intended contract holder must ensure that they have completed the all relevant sections on ACTOR of the invitations to tender (ITTs) for all the provision to be delivered by both themselves and their sub contractors.

19. In our current consortium we have three delivery partners who do not hold their own contract with the Skills Funding Agency. Can we continue to sub-contract with them when minimum contract levels are introduced or would we have to run down their current carry over delivery? (UPDATE)

This depends on whether you will continue to hold a direct contract with the Agency or not. If you will yourself be a sub-contractor, as a result of the application of MCL, further sub-contracting will only be agreed in exceptional circumstances (e.g. where the delivery of a technical certificate within an apprenticeship framework is sub-contracted to another provider).

Requests should be made through the declaration of sub-contractors return which will form part of the contract with the Agency. This will prompt a full application to be issued which must be completed before consideration can be given to the request. Ordinarily this will be done before the third tier sub-contractor is engaged.

20. I understand that there are legal issues that the Skills Funding Agency is looking into related to moving to MCL arrangements. What are they, and do they affect any of the potential models we are considering using? (UPDATE)

Following consultation with the Agency's solicitor there are no specific legal issues. See also questions 21 and 23.

The Agency has been clear that it is not promoting or preferring any one model of delivery over any other and that the new arrangements will need to be reflected in an ACTOR application by the intended lead provider.

The Agency has been working with the Learning and Skills Improvement Service to develop independent guidance on possible contracting models. More information on these, and other resources, can be accessed via:

<http://www.excellencegateway.org.uk/MCLsupport>

21. What are the procedural issues related to new providers arrangements being registered on ACTOR? (UPDATE)

All organisations that wish to be considered for funding from the Skills Funding Agency will need to satisfy the same requirements and be registered on ACTOR, regardless of the type of delivery model the organisation wants to employ. Where these organisations are made up of existing contractors who wish to operate through the new organisation then the ACTOR submission of the intended contract lead will need to clarify the arrangements between them and their sub-contractors and reflect the areas in which they intend to deliver. The intended lead contractor will also need to update their annual declaration of sub-contractors.

Being registered on ACTOR does not guarantee that a contract will be awarded but it is essential for an organisation that wishes to be considered for funding. It is recognised that a new organisation set up for the purpose of tendering for funding from the Agency will not have a track record in delivering the programmes being tendered for. Hence, the contracting process follows from ACTOR and can take into account additional information, such as the track record of any proposed sub-contractors and other corroborative evidence, particularly in cases where the bidding organisation is newly established. It is recommended that the proposed members of a new entity submit

ACTOR ITTs under their own names. If the members of the new organisation are themselves registered on ACTOR then this establishes their track record, which supports the tender from the new organisation.

Guidance on entering sub-contract arrangements is available from LSIS via the Excellence: <http://www.excellencegateway.org.uk/MCLsupport>

22. Does the MCL apply to the all providers below the MCL threshold? (UPDATE)

The following types of provider/employer will be exempt from the application of a minimum contract level due to the specific nature of the contractual relationships that the Agency has with them:

- General FE colleges
- Specialist Colleges (e.g. of Art and Design)
- Employers contracted to the National Employer Service
- Higher Education Institutions
- Sixth Form Colleges
- Schools/Community Colleges/Academies

The case for exemption reflects the different account management and funding relationships that the Agency has with them.

Even though these providers will not have the threshold applied to them the Agency still expects that they will achieve similar efficiencies and economies of scale within their own provision activities, such as are negotiated between large employers and the National Employer Service (NES).

23. Can the Skills Funding Agency advise me of the best option for my arrangements or offer any legal advice? (UPDATE)

It is not appropriate for the Skills Funding Agency to offer advice to individual colleges or training organisations. The Agency would encourage all colleges and training organisations to seek their own legal advice before entering into new legal arrangements but this is not a service that the Agency is able to offer.

Guidance on entering sub-contract arrangements is available from LSIS via the Excellence Gateway: <http://www.excellencegateway.org.uk/MCLsupport>

24. How much money is going to be saved by the Agency in undertaking this process?

With the introduction of the minimum contract level at £500k, the Agency will be able to significantly rationalise the number of direct contracts it holds and manages. Currently, the Agency has 639 direct contracts with providers that have contract values of less than £500k and account for only 3% of funding allocated in 2010/11. Once the number of direct contracts has been rationalised, the Agency will be able to achieve savings and reduce overheads but it is too early to quantify how much this might be.

25. Will you take account of quality as well as contract value? (UPDATE)

The introduction of the MCL is based on the initial 2010/11 allocations so quality was taken into account when these allocations were made. Ongoing quality will be taken into account as part of the allocations round for the following year and thence the MCL threshold applied to these allocations, i.e. as part of the Minimum Levels of Performance

(MLP) process, 2011/12 indicative allocations will be adjusted where provision is below the MLP. (See also question 38 below).

Where the application of MLP means a provider moves in year from above the minimum contract level to below a decision will be made whether the MCL should be applied.

26. Have you considered the risk that there will be multi layers of sub-contracting? (UPDATE)

*The Skills Funding Agency's Funding Requirements clearly sets out the expectation that sub-contracting is only to one level, apart from where exceptional circumstances are **pre-agreed** by the Agency to allow more than one level. The Agency will be monitoring the volume and pattern of sub-contracting throughout 2010/11 to ensure it is aware of any risks that it then needs to manage.*

See also the answer to question 19 above.

27. Will there be limits on the number of sub-contractors a provider will have? (UPDATE)

The Agency will impose no specific limits. However the Agency recognises the need to manage potential risk to public funds where it exists. The Agency will therefore be monitoring the volume and pattern of sub-contracting and will enter a dialogue with lead providers where it can see that the number or value of sub-contractors in an arrangement may pose undue risk.

As part of the annual declaration process the Agency has been notified of the providers currently delivering education and training as sub-contractors to Agency contract holders. The introduction of the MCL is likely to increase this figure by between 5-10%.

28. Will not for profit/charitable companies be considered more favourably than private providers? (UPDATE)

The Agency's focus is on learners and quality of provision not providers, therefore the Agency is adopting a provider neutral approach to the implementation of the minimum contract level. The approvals process for new delivery arrangements is the same for all providers.

Voluntary organisations will continue to be eligible to receive public funding directly and indirectly through sub-contracting and consortia arrangements to support delivery across the whole of the skills system.

The Agency recognises the contribution that third sector makes and safeguards are in place to ensure that where there is a risk of specialist provision being lost, or a significant impact on the choice available in particular localities for example, in rural communities, the Agency will consider on a case by case basis whether alternative arrangements should be made.

29. Will there be any tolerance on the level set, e.g. where an allocation is just below the threshold? (UPDATE)

No. The Agency is applying the minimum contract level without a tolerance. Subject to the impact assessment of the implementation of the MCL it is anticipated that over time the MCL threshold will rise.

30. How many providers are there above £500k?

Of the 1,536 providers the Agency allocated to at the start of 2010/11, 639 have contract values of less than £500k (this figure now includes ESF only providers) and 897 have contract values of above £500k.

31. How will managing agents be treated? (UPDATE)

The Agency will continue to use a full Office of the Journal of the European Union (OJEU) procurement process for specifically procuring managing agents for the management of services such as information, advice and guidance rather than the direct delivery of education and training.

The Agency will simply seek to procure educational and vocational training services and it will be for organisations to determine their own delivery model. This means that applications from managing agents will be treated in the same manner as for all other provision models through ACTOR.

32. How will new providers be treated?

Where a new provider (that does not currently contract with the Agency) wishes to secure funding from the Agency, it will need to be approved through ACTOR. ACTOR will assess value for money, risk to the Agency, capacity, capability and resource. The Agency may request guarantees from shareholders from those organisations without a track record. While being on the register will not be a guarantee of funding, the Agency will only consider those organisations on the register for funding.

33. Geoff Russell has promoted the idea of 'Hard Federations' could you define what a 'Hard Federation' is and if it applies to the MCL policy?

The Agency would not use the word 'hard' in relation federations because it implies there are several types whereas really there is just one definition which is:

"A federation is an alliance of FE colleges underpinned by a contractual agreement to co-operate to deliver education and training"

There are three basic models for a federation -

- a The Chief Executive of Skills Funding funds one college as the lead for all the provision in a particular area. This college enters into a contractual arrangement with all the other colleges to deliver the provision, the contract would set out each individual colleges responsibilities for delivery and would probably need to include some joint governance arrangements.*
- b The Chief Executive enters into an agreement to fund a number of colleges on a joint and several basis to deliver the provision in a particular area. The colleges then enter into an agreement with each other to set out their respective responsibilities under the funding agreement with the Chief Executive and this again may include some joint governance arrangements.*
- c A number of colleges establish a joint venture company with whom the Chief Executive contracts to deliver provision in a particular area.*

Any of the models may also include shared service arrangements for back office functions and/or delivery.

34. How will the new round of ESF contracts be treated with regard to the MCL? (NEW)

Contracts for the next round of ESF funding are due to be agreed in time for provision to start in April 2011 and will be let for between 16 months to 4 years.

Contracts to deliver Not in Education, Employment or Training (NEET) and Community Grant activity will not be affected by the introduction of the MCL and could be let for values less than the MCL threshold.

Allocations for 19+ Adult Skills activity contracts will be let in relation to the MCL threshold, i.e. no stand alone ESF contract will be let for less than the annual MCL threshold (i.e. £500k per year). Providers holding other Agency contracts could be in receipt of ESF contracts that are less than the MCL threshold on the grounds that they are already above the threshold, although it is unlikely that there will be many small ESF contracts let.

35. Could more providers be added to the MCL list as a result of current actions? (NEW)

There will be no changes to the determination of which providers are above or below the threshold in year. The MCL threshold is applied to the aggregate value of a provider's contract at the start of the academic year (i.e. the value at the start of the 2010/11 year for allocations for the 2011/12 year). Changes to MCV in year affect the following year's allocation and therefore the next application of the MCL threshold.

See also answers to questions 1 and 4 above.

36. Can we have clarity on timescales for notifications from providers affected by the implementation of MCL? (NEW)

The Agency required providers to submit a formal declaration of intent at the end of February (28/02/11) (as per letter 14 December, signalled) and will provide a template for providers to do this combining a declaration from the intended contract holder and their partners/sub-contractors.

ACTOR will be open to providers to update their existing records to reflect new arrangements or in circumstances where an organisation new to the Agency is put forward to hold contracts, for them to make their initial registration. ACTOR will be frozen in Friday 11 March as an interim and then open again until a final freeze on Friday 15 April. Any provider who has not submitted an Invitation to Tender for the provision they wish to deliver cannot be considered for funding.

37. How will the threshold be applied in future years and will it be raised? (NEW)

The MCL threshold, currently £500k, will be applied against the allocation a provider receives for the start of the previous academic year, i.e. for 2011/12 it is applied to the allocation for 2010/11 and for 2012/13 it will be applied against the allocation for 2011/12. Providers close to the threshold are able to influence their subsequent year's allocation through their performance and quality of provision.

Any change to the threshold will be made following an impact assessment. This will review impact on provision/learners ensure no unintended consequences as a result of

implementation etc. Providers will be given maximum notice of any change in the threshold and how it applies to them.

38. Will there be a process for exempting providers? (NEW)

The Agency is keen not to lose high quality provision, particularly in specialist areas, or rural communities. The Agency has ensured that its wider procurement processes reflect the need to accommodate new arrangements, for example by relaxing previous restrictions on sub-contracting, which will therefore enable more collaborative, but still efficient, arrangements to flourish.

The Agency's commitment is to ensure that suitable provision is available to learners and that the implementation of MCL does not hinder this. To ensure that appropriate provision is available to learners the Agency will put in place a process to ensure that specialist/niche quality provision will not be lost if the provider is not able to establish new contracting arrangements or to grant an extension of time in order for a provider to complete arrangements. However it is not intended to be a mechanism just to protect a provider that is not able to enter arrangements.

39. What is the Agency's view of joint and several contracting arrangements? (NEW)

Any bid to be considered for funding by the Skills Funding Agency must come from the organisation that will hold the contract should one be offered. A contract with a consortium on the basis of joint and several liability would only be considered under exceptional circumstances.

40. In becoming a sub-contractor to another organisation I am worried about losing my identify as a deliverer of high quality training? (NEW)

Whilst the Agency will no longer have a direct contract relationship with sub-contractors their provision will still be visible through the mandated completion of the Individualised Learner Record field A22 – Franchise and partnership delivery provider number, which captures the UKPRN of the delivery organisation.

You will therefore also be able to attribute specific learners to your delivery activity and from this calculate success rates using the Agencies published methodology. Furthermore Ofsted inspections take due regard of sub-contractor delivery within the overall performance of the contracted provider and reserve the right to inspect sub-contractors directly.

41. We have registered as a new organisation on ACTOR for the purpose of holding the aggregate contract values of our sub-contract partners. When will we be notified of the approval of our arrangements? (NEW)

In terms of changes resulting from the implementation of the MCL, the ACTOR freeze from which the Agency will review ACTOR submissions (for new entities) and updates (for existing organisations) has been published as 17:00 Friday 15 April. It is after this point that submissions will be evaluated and scored. Up to this point an organisation's submission is open and they have the ability to update any of the details they have submitted, therefore it would be inappropriate for us to comment on specific cases. A further freeze of ACTOR will be taken at 17:00 Friday 13 May to capture updates from lead providers regarding those providers affected by MCL who had previously declared a requirement for more time to conclude arrangements.

Guidance on what the Agency expects an organisation's submission to contain is available on the Agency's website:

<http://skillsfundingagency.bis.gov.uk/providers/programmes/actor/>

We would encourage organisations to ensure that their sub-contractors are registered on ACTOR as this will enable the Agency to clearly track the movement of existing providers into sub-contract arrangements with new entities.

42. As a Local Authority below the MCL threshold I am looking to enter into new arrangements, however the Council's governance processes do not permit this to be concluded by the deadlines set. What can I do? (NEW)

It has been agreed with the National Institute of Adult Continuing Education (NIACE) that Local Authority providers may submit a business case to the Agency setting out their new contract arrangement intentions and the set timeline for achieving this. On the basis of this submission the Agency will grant up to a years extension to the Authority in order to complete their governance processes.